Supreme Court, U.S.
FILED
JUN 8 2001
OFFICE OF THE CLERK

No. 00-1685

In the
Supreme Court of the United States

THE STATE OF OKLAHOMA ex rel. Moshe Tal and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Petitioner,

vs.

THE CITY OF OKLAHOMA CITY, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The Supreme Court of Oklahoma

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Oklahoma courts violate the Due Process Clause by holding as a matter of Oklahoma law that individual taxpayers who appeared at trial through counsel and were given an opportunity to argue for intervention under the Oklahoma *qui tam* statute in a declaratory judgment action concerning the enforceability of downtown redevelopment agreements did not have standing to prosecute an action on behalf of the state for a bounty because the City of Oklahoma City, the governmental entity upon which the individuals had served a written demand, had acted in good faith by instituting the declaratory judgment action?

CORPORATE DISCLOSURE STATEMENT

Oklahoma Gas and Electric Company states that it is a wholly-owned subsidiary of OGE Energy Corporation, a public company.

The Benham Group states that it is a wholly-owned subsidiary of Atkins Benham, Inc., which is a wholly-owned subsidiary of Atkins Benham US Holdings, Inc., which is wholly-owned subsidiary of W.S. Atkins, P.L.C., a public company.

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STATEMENT OF THE CASE

Overview of the Re-Development of Downtown Oklahoma City. Like many American cities, Oklahoma City has experienced a deterioration of its downtown area over the last several decades. Although there has been significant economic development of outlying areas of the city and its suburbs, much of the infrastructure in the city's core has been underutilized, abandoned, or even demolished. In 1993, the citizens of Oklahoma City decided that this deterioration should be reversed. They voted in a temporary one-cent increase in the sales tax in order to support public and private investment in the downtown area, such as a new library, a new art museum, a new baseball stadium, renovations to the convention center and performance center, and a variety of improvements in a downtown entertainment zone called "Bricktown."

Under this program, known as the "Metropolitan Area Projects" program, or "MAPS," the Oklahoma City Council enacted a redevelopment plan for Bricktown that involved conveying land to the Oklahoma City Urban Renewal Authority ("OCURA"), which would in turn sell the land to developers for at least fair market value and provide proceeds to the city. Formally approved on July 24, 1997, the redevelopment plan contemplated awarding significant contracts to a private developer who would carry out specific improvements in Bricktown, including providing parking for the Bricktown area and the adjacent minor-league baseball stadium.

The Oklahoma City Council's Deliberations and Vote. Petitioner Moshe Tal ("Tal") hoped that he would be that private developer. He submitted proposals to the city council in conjunction with other investors, as did Bricktown TMK/Hogan Entertainment, L.L.C., and various affiliated entities (the " Hogan Respondents").

The city council deliberated over the competing development proposals for two years. It encouraged extensive review of the proposals through public notices, meetings, and hearings. A significant minority of the council argued for Tal's proposals, but the majority

favored the plan offered by the Hogan Respondents. The ultimate votes on the proposals were close – on one major component, only five of the nine council members voted for the Hogan plan. On July 21, 1998, the city approved the last of three redevelopment agreements involving the Hogan Respondents and OCURA relating to improvements to Bricktown.

The Oklahoma *Qui Tam* Statute and Tal's *Qui Tam* Demand. Tal, however, was unwilling to accept the city council's thorough deliberations. On January 12, 1999, he delivered to the city a written demand concerning several MAPS-related transactions. Among other things, Tal demanded that the city declare the redevelopment agreements void and that it institute proceedings against the Hogan Respondents and OCURA to recover proceeds relating to their agreements. In addition to Tal, thirteen individuals signed the petition on behalf of an organization calling itself "Taxpayers Against Rip-Offs" ("TAR").[1]

Tal purported to make this demand pursuant to Oklahoma's *qui tam* statutes. *See* 62 Okla. Stat. §§ 372 & 373; App. at 44-45. Under those statutes, a citizen may bring a suit on behalf of a governmental entity for "the recovery of any money or property belonging to" that entity, but only after the entity has refused, failed, or neglected to institute proceedings for the recovery of its money or property after being served with a written demand by ten resident taxpayers. Section 373 provides that the money or property subject to the written demand must have been transferred by an officer of the governmental entity pursuant to an "unauthorized, unlawful, fraudulent, or void contract." Only in the event that the entity fails to pursue the demand can a citizen bring suit "in the name of the State of Oklahoma as plaintiff" and recover half of the recovery "as a reward."

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[1] Tal is the driving force behind TAR. Indeed, when Tal was out of town at the beginning of the trial in *Tal I*, TAR's counsel claimed that no one else had the information necessary to support TAR's motion to intervene. Thus, references to Tal throughout this Opposition also serve as references to TAR.

The City's Response: The Declaratory Judgment Action (*Tal I*). In response to Tal's demand, the city brought a declaratory judgment action in the District Court for Oklahoma County against the Hogan Respondents and OCURA on January 26, 1999. Contrary to Tal's assertion that the city's action "did not contain any mention of the claims relating to conflicts of interest," *see* Petition at 7, the city's petition attached Tal's written demand, which included allegations of conflicts of interest, as an exhibit and asserted that "[a]n actual controversy has arisen concerning the validity of the Agreements because of the allegations contained in the Written Demand." The city requested that, should the court find the redevelopment agreements invalid as wrongful transfers, it issue a declaration that the agreements are void and order the defendants to return the money and property involved in the agreements to the city. The Hogan Respondents filed a counterclaim against the city and a cross-claim against OCURA, both seeking an injunction requiring performance under the redevelopment agreements.

Tal's Petition before this Court suggests that the city, the Hogan Respondents, and OCURA conducted the declaratory judgment action behind Tal's back. Nothing could be further from the truth. Tal received copies of the city's petition and the responsive pleadings. Tal and the other taxpayers who signed the written demand – all represented by counsel – sat for depositions relating to their allegations in the weeks leading up to the trial. Everyone involved in the matter was aware that the city needed to prosecute its claim quickly because investors in Bricktown would not be willing to commit significant funds to the development of Bricktown until the litigation that Tal had stirred up was resolved. Thus, on February 3, 1999, the parties stipulated that the case should go to trial on March 1. And, of course, the trial date was a matter of public record.

Tal's Motion to Intervene. Tal's attempt to create the impression that he was surprised when the case went to trial springs from the fact that he and his counsel presented a less-than-impressive motion to intervene on the morning of trial. Tal's counsel asked for the proceedings to be delayed on the grounds that Tal was in Puerto Rico. The court refused to postpone the case for Tal's convenience, but it did take the time to hear his counsel's argument for intervention. Tal's

counsel declined to offer evidence in support of his motion. He indicated that he had nothing to add beyond the information in the written demand and the depositions of Tal and the other taxpayers. After considering the argument, the written demand, and the depositions, the trial court denied the m otion.

The court then conducted the trial and entered a declaratory judgment that the redevelopment agreements are valid and enforceable.

Tal's Appeal of Denial of Intervention. Tal appealed the denial of his motion to intervene to the Oklahoma Supreme Court.[2] His brief argued that the trial court abused its discretion by failing to grant him permissive intervention. It made no mention of intervention of right.

Taking the case on an expedited basis, the Oklahoma Supreme Court affirmed in *The City of Oklahoma City v. Oklahoma City Urban Renewal Authority* ("*Tal I*"), 988 P.2d 901 (Okla. 1999). It held that Tal lacked standing to intervene under the Oklahoma *qui tam* statute. "Taxpayers may intervene in an action brought by a public body," the court explained, "only if the public body fails to respond to a written demand with action taken in good faith." 988 P.2d at 906, App. at 27 (citing *Braly v. Ford*, 116 P.2d 988 (Okla. 1941)). It held that "there is nothing in the record to reflect that Oklahoma City acted in bad faith. Its actions were taken under the glare of public scrutiny and were resisted by a significant minority of the City Council." *Id.* There was no dissent.

Tal's Further Litigation: *Tal II*. Before Tal delivered his written demand to the city concerning Bricktown, he attempted to conduct a similar effort to frustrate the operation of the new baseball stadium adjacent to Bricktown. On September 9, 1998, within two months of the last redevelopment agreement with the Hogan Respondents, Tal

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[2] Under Oklahoma procedure, all civil appeals go directly to the Oklahoma Supreme Court. That court can choose to retain jurisdiction or to assign the appeal to an intermediate appellate court. The Oklahoma Supreme Court retained jurisdiction of all appeals brought by Tal relating to the redevelopment of downtown Oklahoma City.

delivered to the city a written demand that it rescind contracts that it had entered through the Oklahoma City Public Property Authority with the Oklahoma City Athletic Club relating to the ballpark. According to Tal, the transactions were void for lack of consideration. He then actually filed a *qui tam* lawsuit and demanded monetary damages from the city. On October 16, 1998, the city responded to the demand by filing a declaratory judgment action against the Oklahoma City Athletic Club. The city also moved to dismiss Tal's claims. Tal argued that he should be permitted to proceed against the city because the city's declaratory judgment action was not a sufficient response to his demand. The trial court dismissed Tal's claim.

On October 26, 1999 – after handing down its opinion in *Tal I* – the Oklahoma Supreme Court affirmed dismissal of Tal's claim concerning the ballpark agreements in *State of Oklahoma ex rel. Tal v. Norick* ("*Tal II*"), 991 P.2d 999 (Okla. 1999). The court did not feel compelled to explain at length that because the city had instituted a declaratory judgment action, Tal did not have standing to pursue a *qui tam* action. It stated simply:

> Although Tal and T.A.R. sought to intervene in the City's action in *Tal I* and did not prosecute an independent *qui tam* action, as they have done here, the plaintiffs' theories in support of intervention in *Tal I* were substantially similar to those presented by plaintiffs here in support of their claimed right to prosecute a *qui tam* action. . . . The similarity between the record presented here and the record we considered in *Tal I* convinces us that there is no reason to restate here our reasoning in *Tal I*. We therefore hold that the trial court did not err in concluding that the *qui tam* action was prematurely brought.

Tal II, 991 P.2d at 1001, App. at 37-38. Again, there was no dissent.

Tal's Still Further Litigation: *Tal III*. Unbowed and still disgruntled, Tal brought yet another action on March 15, 2000. This time he sued the city, OCURA, the Hogan Respondents, and a host of other entities and individuals in a purported *qui tam* action based on his written demand in *Tal I*. Among these other defendants were

Oklahoma Gas and Electric Company ("OG&E") and The Benham Group, which were involved in a separate MAPS-related project involving an on-site heating and cooling system for the enlarged downtown convention center and sports arena. Tal's Petition alleged that the city's decision to discontinue service from a district heating and cooling company in favor of installing an on-site heating and cooling system constituted an illegal contract and an unlawful expenditure of MAPS funds.

The trial court dismissed as to all defendants, and Tal once again took his case to the Oklahoma Supreme Court. In *State of Oklahoma ex. rel. Tal v. The City of Oklahoma City* ("*Tal III*"), 19 P.3d 268 (Okla. 2000) (*per curiam*), the court once again explained that Tal does not have standing to prosecute a *qui tam* action under the Oklahoma statute. *See Tal III*, 19 P.3d at 272, App. at 10 ("We affirm the trial court's order dismissing Tal and T.A.R.'s action because Tal and T.A.R. lack standing to prosecute this action concerning the Bricktown project.").

This time, however, there was a dissent. Justice Watt concurred in the holding that Tal lacked standing, but he disagreed with "the majority's failure to address what is to me quite clear: that Tal and T.A.R.'s conduct in filing and prosecuting this action is likely sanctionable." *Id.*, App. at 10 (Watt, J., dissenting in part). He noted that Tal's "serial lawsuits and appeals" have "hindered the Bricktown project, including, according to appellees, the loss of investors who have refused to participate only because of this constant litigation." *Id.*, App. at 10 (Watt, J., dissenting in part). Based on the frivolous appeal, he would have granted leave *sua sponte* for defendants such as OCURA and the Hogan Respondents to file sanctions motions beyond those filed in the trial court relating to Tal's bringing the *Tal III* suit in the first place. *See id.* at 273, App. at 12 (Watt, J., dissenting in part).

On December 12, 2000, the trial court in *Tal III* ordered Tal to pay the defendants $185,000 in attorneys' fees for bringing the purported *qui tam* suit in bad faith.

REASONS FOR DENYING A WRIT OF CERTIORARI

I. Tal Has Waived His Right to File this Petition.

A. Tal Grounded His Argument Before the Oklahoma Supreme Court on Permissive Intervention, Not Intervention of Right.

According to Tal's Petition, he had a right – indeed, a constitutional right – to intervene in *Tal I*. He frames the issue as whether the Oklahoma Supreme Court violated the Constitution by enforcing the preclusive effect of its earlier decision "denying intervention of right on the grounds that the taxpayers' rights are adequately represented." Petition at 13. His Petition makes no argument based on permissive intervention. In listing the constitutional and statutory provisions involved in his Petition, he includes only the subsection of the Oklahoma intervention statute dealing with intervention of right.[3] *See also* Petition at 18 (citing the standard for intervention of right and failing to cite the standard for permissive intervention).

But Tal failed to argue intervention of right when he appealed to the Oklahoma Supreme Court in *Tal I*. That court noted: "Tal and T.A.R. do not claim that T.A.R. was entitled to intervene as of right. Their claim is that the trial court erred in not allowing T.A.R. to intervene on a permissive basis under § 2024.B.2." *Tal I*, 988 P.2d at 905, App. at 26-27.

Tal insists that he has preserved his right to argue intervention of right in this Court. *See* Petition at 8 n.2. He claims that he raised the issue in the Oklahoma Supreme Court by including it in his list of issues to be raised on appeal, filed at the outset of the Oklahoma appellate process. But Tal does not deny that he failed to include any

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[3] Section 2024 of the Oklahoma Pleading Code parallels Rule 24 of the Federal Rules of Civil Procedure. *See* App. at 45-46. Tal lists § 2024.A, which addresses intervention of right, as legal authority; he does not list § 2024.B, which addresses permissive intervention. *See* Petition at 5.

argument concerning intervention of right in his appellate brief in *Tal I*. Under Oklahoma Supreme Court rules, a party waives any argument that it fails to brief. *See DLB Energy Corp. v. Oklahoma Corp. Comm'n*, 805 P.2d 657, 659 n.6 (Okla. 1991) ("Although DLB Energy argued in its petition in error that exclusion of the evidence was error, it did not brief the issue. The question is waived."). In any event, his assertion that the Oklahoma Supreme Court was "mistaken" in finding waiver, *see* Petition at 8 n.2, rings hollow at this late date. Tal's petition for rehearing in *Tal I* failed even to attempt to explain how the finding of waiver was a "mistake."

B. Tal's Challenge to the Oklahoma Supreme Court's Holding in *Tal I* Is More than a Year Too Late.

Tal vigorously prosecuted the denial of intervention in *Tal I*. The Oklahoma Supreme Court received full briefing on the issue and on August 30, 1999, issued an opinion for publication addressing Tal's arguments. The court denied rehearing on September 30, 1999. If Tal believed that denial of intervention raised a federal constitutional issue, he had an obligation to petition this Court for certiorari within 90 days of denial of rehearing in *Tal I*. Indeed, his counsel stated on the record in the trial court that he was prepared to seek a writ of certiorari from this Court in the event the Oklahoma courts refused to let him proceed. He chose not to do so.

Tal's indirect challenge to the intervention ruling through this challenge to the subsequent opinion re-affirming the reasoning of *Tal I* is an impermissible attempt to extend indefinitely this Court's deadline for filing a petition for certiorari.

II. The Oklahoma Supreme Court's Decision in *Tal I* Was Based on Lack of Standing, Not Adequacy of Representation.

Tal purports to challenge the preclusive effect of the Oklahoma Supreme Court's finding "that the government is 'adequately representing' the taxpayers' interests." Petition at *i*. The Oklahoma Supreme Court, however, did not affirm denial of intervention in *Tal I* because the city and its attorneys adequately represented Tal and the taxpayers. Rather, it affirmed because Tal and the taxpayers lacked

standing under the Oklahoma *qui tam* statute. Under that statute, Tal had the burden of overcoming the presumption that the city acted in good faith in responding to his demand. *See Braly v. Ford*, 116 P.2d 988, 990 (Okla. 1941). The trial court found that he failed to overcome that presumption, and after reviewing the record, the Oklahoma Supreme Court held that this finding was not an abuse of discretion. *See Tal I*, 988 P.2d at 906, App. at 27.

The good-faith standard is significantly different from the adequacy-of-representation standard upon which Tal grounds his entire Petition. At bottom, it is a safeguard against public corruption. It is not designed to protect the rights of individual litigants or groups. To carry his burden under the good-faith standard, Tal would have had to make a "showing of fraud or unlawful activity." *Id.* As the argument in Tal's Petition seems to concede, there was no such evidence presented in the Oklahoma courts:

> [T]here is nothing in the record to reflect that Oklahoma City acted in bad faith. Its actions were taken under the glare of public scrutiny and were resisted by a significant minority of the City Council. That the disagreements among Council members were resolved in a way that Tal and the other T.A.R. members do not like does not support in any way T.A.R.'s claim that the Development Agreements were either fraudulent, unlawful, or otherwise inadequate.
>
> That a more attractive deal for Oklahoma City might have been made, as T.A.R. asserts it could and should have been made, is not for this Court's consideration. Such issues were for the City Council and the City Council resolved them. There being no showing of fraud or unlawful activity here, T.A.R. ***lacks standing*** to attack the City Council's decisions.
>
> . . .
>
> Because we conclude that Moshe Tal's petition for intervention was correctly denied, he stands excluded as a party litigant below and ***has no standing*** to tender for our review any errors made by the trial court.

Id. (emphasis added). *See also Tal III*, 19 P.3d at 271, App. at 7 ("Nowhere in their brief did Tal and T.A.R. attempt to explain why

they had standing to prosecute a *Qui Tam* action under their Written Demand, although we had held in *Tal I* that they lacked standing to do so.").

The court's holding in *Tal I* reflects the nature of *qui tam* actions, which permit citizens to stand in for the state as plaintiffs in specified circumstances but do not give citizens any cause of action of their own. If they satisfy the statutory requirements – in this case, proving that the city acted in bad faith – then they have standing. But if they do not, they have no legal rights to assert. As the Ninth Circuit concluded in *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765 (9th Cir. 1997), a citizen never has an absolute right to intervene in a *qui tam* action. Because "a *qui tam* plaintiff by definition asserts not his own interests, but only those of [the government]," it is impossible for him to establish that the parties already present in the lawsuit do not adequately represent him. 125 F.3d at 768 (citing cases). Thus, Tal had no legal rights that the city or its attorneys were obligated to press on his behalf.

Tal suggests that he was entitled to intervene in the city's action because the city had a conflict of interest. He attempts to link this alleged conflict of interest to the type of intra-class conflict that can justify overturning a judgment in a class action. *See, e.g.*, Petition at 10-11 ("[T]he Taxpayers contended that under *Hansberry v. Lee* the judgment in the City's action did not bar the Taxpayers' action because the City had a conflict of interest with Taxpayers and, thus, did not adequately represent them at trial."). This conflict-of-interest theory has no basis in *qui tam* law, however. When taxpayers deliver a written demand that the government investigate the allegedly improper disposition of money or property, the governmental body will almost always face a conflict of interest. Like all potential *qui tam* plaintiffs, Tal was asking the government to investigate itself. The Oklahoma statute limits *qui tam* litigation based on a conflict of interest by permitting *qui tam* suits only on a showing that the government has investigated itself in bad faith. Under Tal's theory, by contrast, there would be no limit on *qui tam* suits, for every group of taxpayers who delivered a demand would be entitled to intervene based on an unproven suspicion that the government has succumbed to a conflict of interest. Fortunately, there are clear limitations on *qui tam*

plaintiffs. Under Oklahoma law, bounty hunters such as Tal simply do not have standing to sue on behalf of the government based on the mere possibility that the government will not investigate itself adequately.

By framing the question before this Court in terms of adequacy of representation and governmental conflict of interest rather than standing, Tal raises an issue that simply was not before the trial courts or the Oklahoma Supreme Court in *Tal I* or *Tal III*.[4]

III. Denial of Intervention Under the Oklahoma *Qui Tam* Statute Does Not Raise a Question of Federal Due Process Law.

A. *Hansberry v. Lee* Concerns the Due Process Rights of Absent Parties in Representative Actions Who Are Real Parties in Interest and Mount a Collateral Attack.

Tal's Petition relies almost exclusively on this Court's opinion in *Hansberry v. Lee*, 311 U.S. 31, 61 S. Ct. 115 (1940). According to Tal, the *Hansberry* Court held that "res judicata arising out of a representative action cannot bind a non-party where the non-party's interests were not adequately represented." Petition at 13.

This reliance is misplaced. The pivotal words in Tal's formulation of the holding in *Hansberry* are "representative action" and "non-party." Without any grounding in the rationale of *Hansberry*, Tal is

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[4] Variations on the phrase "adequacy of representation" did find their way into the Oklahoma Supreme Court's opinions in *Tal I* and *Tal III*. But the reasoning in the opinions indicates that the Oklahoma Supreme Court was focused on the good-faith standard and the question of standing, not the question of whether the city was an adequate legal representative of Tal's personal interests. *See, e.g.*, *Tal III*, 19 P.3d at 271-72, App. at 9 ("In *Tal I* we held that Tal and T.A.R. lacked standing to prosecute a *Qui Tam* action because they failed to make a showing that the City was not adequately representing their interests."). To the extent that adequacy of representation is relevant in this case, it is adequacy of political representation – i.e., the absence of public corruption – and not adequacy of legal representation, such as in cases flowing from *Hansberry*. *See infra* Part III.C.

attempting to sweep all actions by the state within the phrase "representative action," and he is further asking this Court to apply *Hansberry*'s due, process protections to all citizens, regardless of their personal interests in the "representative" action. This would effectively eliminate any preclusive effect of judgments in civil actions brought by governmental bodies.[5] More to the point, it would contradict this Court's careful holding in *Hansberry*. Under *Hansberry*, when a court enters a judgment ***in a class action*** that would otherwise preclude a ***non-named class member*** from further litigation, that non-named class member may nevertheless prosecute a collateral attack on the judgment ***if he was not involved in the earlier litigation*** and can show that the class representatives did not protect his personal interests adequately.

The *Hansberry* case concerned a collateral challenge brought by African-American land-owners to a judgment in a class action decreeing the enforceability of a racially-restrictive land covenant. The trial court had held that even though the earlier class-action decree was based on "a false and fraudulent stipulation of the parties," 311 U.S. at 38, 61 S. Ct. at 116, the judgment precluded further litigation by any members of the class, even those who were the targets of the racially-restrictive covenant. The Illinois Supreme Court found that the stipulation on which the covenant's validity was based was untrue, but it nevertheless affirmed the holding that there could be no collateral attack.

This Court reversed on due-process grounds and allowed the African-Americans to challenge the validity of the restrictive covenant. The *Hansberry* opinion did not hold, however, that a ***non-party*** has a due-process right to challenge a final judgment whenever it believes that the judgment implicates its interests and that the party whose side it favored failed to prosecute the case vigorously. Indeed, this Court

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[5] Indeed, it is unclear how Tal would limit his due-process principle to civil governmental actions. Its logic extends to judgments in criminal actions in which citizens assert that the prosecution failed to represent the people adequately, especially if the inadequate representation resulted in wasted tax dollars, such as a failure to win monetary criminal penalties.

emphasized that collateral attacks such as the one in *Hansberry* should be permitted only in extraordinary circumstances and that the *Hansberry* principle should only rarely have an effect on preclusion rules established by the states:

> Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; nor does it compel the adoption of the particular rules thought by this court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, this Court is justified in saying that there has been a failure of due process ***only*** in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of ***absent parties who are to be bound by it.***

Id. at 42, 61 S. Ct. at 118 (emphasis added) (citations omitted).

Thus, the petitioners in *Hansberry* were entitled to due process exclusively by virtue of being absent parties to the earlier class action. Indeed, the Court stated explicitly that its holding was based in part on "the relationship between the parties present and those who are absent." *Id.* at 43, 61 S. Ct. at 119. *See also id.* at 44, 61 S. Ct. at 119 (referring to "the protection of the rights of ***absent parties*** which due process exacts" (emphasis added)); *id.* at 45, 61 S. Ct. at 120 (referring to "[t]he doctrine of representation of ***absent parties*** in a class suit" (emphasis added)). Unlike this case, in which Tal claims rights merely as an unrepresented "non-party taxpayer," *see, e.g.*, Petition at 14, the petitioners in *Hansberry* were "parties who [were] represented though absent." 311 U.S. at 43, 61 S. Ct. at 119. And unlike this case, in which the city made no claim to serve as Tal's legal representative and cannot seek to make the ruling in *Tal I* binding on him personally, in *Hansberry* "the members of the class who [were] present [were], by generally recognized rules of law, entitled to stand in judgment for those who [were] not." *Id.*

Tal's Petition cites a number of cases for due-process rules in the same family as the *Hansberry* rule. Not surprisingly, all of these cases involved class actions. For example, Tal cites *City of Tacoma v.*

Taxpayers of Tacoma, 357 U.S. 320, 78 S. Ct. 1209 (1958), for the proposition that "a judgment for or against a governmental body in an action brought by the governmental body on behalf of the public as a general rule is binding and conclusive on all residents, citizens, and taxpayers with respect to matters adjudicated which are of general and public interest." Petition at 17. Tal neglects to mention that the binding effect of the judgment in *Tacoma* was due to the fact that the city certified a class of defendant taxpayers before obtaining judgment. *See* 359 U.S. at 329, 78 S. Ct. at 1215 ("As required by [Washington] statutes the court named representative taxpayers of Tacoma as class defendants and also appointed their counsel."). Similarly, *Richards v. Jefferson County*, 517 U.S. 793, 803, 116 S. Ct. 1761, 1768 (1996), *see* Petition at 1, involved taxpayers who brought a class action based on an allegedly unconstitutional attem pt to "levy personal funds."

Had the petitioners in *Hansberry* not been parties by virtue of the class-action device, there would have been no due-process right to protect. So far as we are aware, the *Hansberry* rule has never been applied in the context of either state or federal *qui tam* actions. *See also In re Real Estate Title & Settlement Services Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir. 1989) ("Ever since *Hansberry v. Lee* was decided in 1940, collateral attacks have been considered to be a necessary part of ***the class action scheme***." (emphasis added)). Indeed, it appears that no court has ever seen fit to entertain the question of whether those who are not parties to *qui tam* actions may bring collateral challenges to denials of intervention on a theory of inadequate representation. There are at least two simple reasons for this. First, litigants who move to intervene in *qui tam* actions are not absent parties. Second, a *qui tam* action is not a "representative action" within the meaning of *Hansberry*. Both reasons defeat Tal's contention that he should be permitted to re-visit *Tal I*'s holding that he had no standing to intervene.

B. Because Tal Was Not an Absent Party at the Trial in *Tal I*, He Has No Due Process Right to Mount a Collateral Attack.

The *Hansberry* rule applies only when an adjudication takes place without any participation by a class member who would otherwise be bound by the judgment. It does not apply when a class member, even if un-named, is aware of the litigation and plays some role in the proceedings.

As this Court put it in *Hansberry*, "[i]t is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where . . . they actually participate in the conduct of the litigation in which members of the class are present as parties." 311 U.S. at 43, 61 S. Ct. at 118. *See also Laskey v. International Union, UAW*, 638 F.2d 954, 957 (6th Cir. 1981) ("Since appellants had the opportunity to object to the legal representation at the prior [class] settlem ent hearing[,] . . . appellants are collaterally estopped from now asserting that the legal representation was not adequate . . . ."); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 296, 297 (S.D.N.Y. 1971) (rejecting a *Hansberry* attack on a class settlement where absent class members who had not opted out appeared through counsel, even though they alleged "that the class representative – the Attorney General of the Commonwealth of Virginia – had an interest antagonistic to them and other members of the class"); 13 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 4451 ("The most direct basis for applying preclusion against a nonparty rests on actual participation in prior litigation. A nonparty who has in fact enjoyed a full and fair litigation has no more claim than a party to enjoy a second chance." (footnote omitted)).[6]

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[6] Indeed, merely receiving notice of ongoing class litigation can prevent those not before the court from mounting a collateral attack under *Hansberry* based on inadequate representation. *See, e.g., Shore v. Parklane Hosiery Co., Inc.*, 606 F.2d 354, 357 (2d Cir.1979) ("[A]ppellants' right to opt-out of the proposed settlement protected their interests from the allegedly inadequate representation."). *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 2974 (1985) (stating that due process has been

In this case, Tal actually participated in the trial. The relevant ruling before the Oklahoma Supreme Court in both *Tal I* and *Tal III* was the trial court's decision in *Tal I* not to permit Tal to intervene. Tal appeared at the *Tal I* trial through counsel to argue in favor of intervention, and the trial court entertained argument and was willing to receive evidence in support of the intervention motion. Tal even took the opportunity to appeal the trial court's ruling. Thus, precluding further litigation would not violate the Due Process Clause. Even if in theory *Hansberry* could authorize a collateral attack on a denial of intervention in a *qui tam* action, Tal has no right to bring such an attack here. He had his day in court.

C. Because an Oklahoma *Qui Tam* Action Is Not a "Representative Action" Within the Meaning of *Hansberry*, Denial of Intervention Could Not Have Violated Due Process.

The Oklahoma *qui tam* statute does not authorize a "representative action" within the meaning of *Hansberry*. It allows citizens to sue on behalf of public entities, but it does not give citizens any personal rights other than the right to collect a bounty if the conditions set out in the statute come to pass. Far from making public bodies and their attorneys the legal representatives of citizens, *qui tam* statutes set out conditions in which the representation relationship runs in the opposite direction: citizens become the legal representatives of public bodies. In Oklahoma, these conditions are met only when the public body acts in bad faith. In any event – in sharp contrast to absent parties in class actions, who have a personal stake in the outcome and thus rely on adequate representation on the part of named class plaintiffs – citizens permitted to prosecute *qui tam* actions do so on behalf of the state and

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satisfied if an absent plaintiff in a class action "receive[s] notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950) (stating that due-process violations involve a lack of "notice and opportunity for hearing appropriate to the nature of the case" when "life, liberty or property" is at stake).

thus have no procedural rights other than those that the state affords them in its *qui tam* legislation.[7]

Contrary to Tal's assertions, *see* Petition at 14-15, this Court has already answered the question of whether states violate the Due Process Clause when they limit the standing of taxpayers who base their claims on the public interest and not on personal rights. In *Richards v. Jefferson County*, 517 U.S. 793, 116 S. Ct. 1761 (1996), two individuals employed in Jefferson County, Alabama, brought a class action seeking to declare a county occupancy tax unconstitutional. The class members were all subject to the allegedly unconstitutional tax; the suit was not a *qui tam* action. Based on the particular factual situation, including lack of notice and the fact that prior proceedings were not even prosecuted as a class action, this Court concluded that an earlier suit involving the occupancy tax did not preclude the class action.

At the same time, however, the Court made it clear in *Richards* that a taxpayer cannot use *Hansberry* to assert a due-process violation in cases "in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds or about other public action that has only an indirect impact on his interests." *Id.* at 803, 116 S. Ct. at 1768. "As to this category of cases, we may assume that the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all." *Id.* Due process comes into play only when a taxpayer challenges the preclusive effect of a prior judgment and also "present[s] a federal constitutional challenge to a State's attempt to levy personal funds." *Id.* Any other rule would conflict with this Court's recognition that "governmental and private entities have substantial interests in the

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[7] Because citizens who wish to assert a *qui tam* action have no personal right to recovery other than the right to a bounty if the statutory conditions are satisfied, Tal's effort to distinguish between the standard for adequacy of representation in Rules 23 and 24 is of no consequence. *See* Petition at 18-21. Regardless of the standard, he was not entitled to have the city act as his legal representative.

prompt and determinative resolution of challenges to important legislation." *Id.* at 804-05, 116 S. Ct. at 1768.

Richards anticipated cases such as this one.[8] It recognized that taxpayers without any personal stake in a governmental decision might attempt to use the notion of adequacy of representation to bring into the courts what should be a purely political process. If citizens as such could use mechanisms like *qui tam* statutes to achieve through litigation what they fail to achieve through the democratic process, then no public body could make a controversial policy decision without subjecting itself to paralyzing litigation in which those who disagree with the policy decision are entitled to argue that the body failed to represent its constituents adequately. As the delays that Tal has inflicted on the Bricktown projects involved in this litigation attest, no government can function with such constraints.

CONCLUSION

Tal's Petition should be denied.

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[8] Tal seems to admit that the Court's analysis in *Richards* undermines his due-process theory. *See* Petition at 13 n.5 ("However, without this Court's further elucidation on the parameters of [its] statement [in *Richards*], the Taxpayers believe that the unconstitutional limits imposed in this case are not within the scope of the rule or preclusion enunciated in *Richards*.").

Respectfully submitted,

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